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No. 6.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1930.

WILLIAM J. STRATTON, Secretary of the State of Illinois,
Appellant,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
a Corporation,
Appellee.

Appeal from the United States Circuit Court of Appeals
for the Seventh Circuit.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLEE.

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STATEMENT, BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

Appellant correctly states the facts, but, in order that the inapplicability of the authorities relied on by appellant may be made more apparent, a more detailed explanation of the pertinent provisions of the Illinois Corporation Act (which are set out in full in the Appendix, infra, page 45) is necessary.

All references to the sections of the statute are to Chapter 32, Cahill's Revised Statutes Illinois 1927, and Chapter 32 of Smith-Hurd's Revised Statutes Illinois 1927. The sections have the same numbers in each statute.

The State of Illinois exacts, and, at the time this controversy arose, exacted, from domestic corporations (Sec. 96) an "initial" (incorporation) fee, but once paid on its stock as issued, and also an "annual license fee or **franchise tax**" for the remainder of the first year (Sec. 129) and yearly thereafter (Secs. 105-107).

Section 80 provides that every foreign corporation shall, "before it transacts any business or maintains an office in this state, procure a certificate of authority therefor from the Secretary of State."

Section 81 provides the form of such application in the manner of a questionnaire covering information from which the Secretary of State may compute the proportion of its capital stock which will be represented in Illinois during the remainder of the first calendar year of its admission by the corporation's estimate of its business to be done within and property to be brought into the state during that period, and by a like estimate of its business and property in other states during the same period.

Section 101 provides for an admission tax (the complement of the "initial" or incorporation fee charged domestic corporations by section 96), requiring a foreign corporation to pay for a "certificate of authority to do business in Illinois, the same fees provided by this to be paid

by a similar corporation incorporated under the laws of this state. * * * All such fees shall be based upon the proportion of its issued capital stock represented by business transacted and property located in Illinois."

In addition to the admission tax of the foreign corporation, an "annual license fee or franchise tax" is exacted of it, covering the remainder of the first year of its admission (Sec. 129), and annually thereafter (Secs. 105-107), based on the proportion of its issued capital stock represented in Illinois, as determined by the estimate stated in the application, pursuant to section 81.

It is the "annual license fee or franchise tax" for the year July 1, 1927-June 30, 1928, which is involved in this appeal. Appellee having prior thereto been admitted into Illinois on the payment of the requisite initial or admission fee.

Having admitted a foreign corporation, as a quasi citizen, into the state, the State of Illinois requires both foreign and domestic to file an annual report, section 102 providing that

> "Each corporation, including railroads, domestic and foreign, * * * shall make a report in writing to the Secretary of State between the 1st day of February and the 1st day of March of each year on the forms to be prescribed and furnished by the Secretary of State. That part of the annual report relating to property and business shall be made as for the calendar year ending December 31st preceding. * * *

> Such annual report shall also disclose such facts as are necessary to enable the Secretary of State to ascertain the proportion of its capital stock represented by business transacted and tangible property located in this state and such other information as may be necessary or appropriate in order to assess the annual license fee or franchise tax."

On the basis of the annual reports (Sec. 109) filed by foreign and domestic corporations the Secretary of State of Illinois is required to determine the proportion of the capital stock represented by business transacted and property located in the state.

Section 106 provides that, "In ascertaining the amount of the issued capital stock represented by business transacted and property located in this state, the sum of the business of any foreign or domestic corporation transacted in this state and the total property of such corporation located within this state shall be divided by the sum of the total business of the corporation and the total property of the corporation wherever situated."

Having determined the amount of capital stock of each foreign and domestic corporation—so represented in Illinois—the Secretary of State computes their annual franchise taxes as is provided by paragraphs 105 and 107 of the statute and as set forth in appellant's brief.

It might be further noted that the bill avers and the statute provides that on the failure of a corporation to pay the annual franchise tax the Secretary of State could and

would forfeit the right of such corporation to do business in Illinois (Sec. 92). The statute provided for divers penalties, against the corporation and its officers, account their failure to comply with the statute (Sec. 114) (Rec., p. 5).

The annual report on which the tax in question was based was filed, as required by the statute (Sec. 102), in February, 1927, and covered property owned and business done in the state during the calendar year of 1926.

The statute (Sec. 112) provided that between the 1st day of February and 15th day of June the Secretary of State should mail a notice to each corporation, notifying it of the amount assessed against it for the ensuing year; and in this case for the year beginning July 1, 1927, and ending June 30, 1928.

The statute under which this cause arises was amended by act approved May 12, 1927, and effective that date, an emergency having been declared (Rec., p. 25) (Illinois Laws 1917, pages 359-360) because the prior statute had been declared unconstitutional.

> See O'Gara Coal Co. (Beatrice Creamery Co., No. 18,177) v. Emmerson, 326 Ill. 18, at 44.

Appellee contended in the District Court (Rec., p. 30), in the Circuit Court of Appeals (Rec., p. 40) and here contends, that, as applied to it, under the facts pleaded, paragraphs 105 and/or 107 of the Illinois Corporation Act are

void, in that they take from appellee rights guaranteed to it by the Constitution of the United States:

1. Unreasonably burdening and directly taxing appellee's commerce between the states, in violation of Section 10 of Article I of the Constitution of the United States.

2. Taxing appellee's property and business outside the State of Illinois, and thereby depriving appellee of its property without due process, contrary to the Fourteenth Amendment to the Constitution of the United States.

3. Charging appellee more than was charged other corporations for the same privileges and discriminating against appellee in favor of **other foreign and domestic** corporations, thereby denying it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

BRIEF.

I.

As to appellant, the tax of one thousand ($1,000.00) dollars resulting from the application under the proviso of section 105 of the scale of minimum amounts of tax provided by Section 107 of the General Corporation Act is void, being a direct, as well as an unreasonable, burden on the interstate commerce engaged in by appellee, in that the annual franchise tax exacted of appellee on that portion of its issued capital represented in Illinois, and amounting to $135.21, is the maximum which can be exacted of it on that part of its capital stock so represented in Illinois, and when the appellant assessed an additional tax of $864.79 such additional amount necessarily fell partly on the interstate business conducted by appellee and amounted to a direct tax and an unreasonable burden on appellee's commerce between the states.

Western Union Tel. Co. v. Kansas, 216 U. S. 1;
Ludwig v. Western Union Tel. Co., 216 U. S. 146;
Looney v. Crane Co., 245 U. S. 178;
International Paper Co. v. Mass., 246 U. S. 135;
Air-Way Electric Co. v. Day, 266 U. S. 71;
Gudahy Packing Co. v. Hinkle, 278 U. S. 460.

II.

Appellee is likewise deprived of its property without due process of law, within the inhibition of the Four-

teenth Amendment, because, when computed on the basis of the portion of appellee's issued capital stock represented by property and business in Illinois, the franchise tax would amount of $135.21, and when appellant assessed a tax of $864.79 in addition thereto, such additional assessment fell on appellee's capital stock, which represented its property in other states, and amounted to an unlawful tax upon appellee's property in other states.

Western Union Tel. Co. v. Kansas, 216 U. S. 1;
Ludwig v. Western Union Tel. Co., 216 U. S. 146;
A. T. & S. F. Ry. Co. v. O'Connor, 223 U. S. 280;
Looney v. Crane Co., 245 U. S. 178;
Air-Way Elec. App. Corp. v. Day, 266 U. S. 71;
Cudahy Packing Co. v. Hinkle, 278 U. S. 460.

III.

After admitting a foreign corporation the state cannot impose an annual excise, where the sole business conducted by the corporation within the state is in interstate commerce.

Alpha Portland Cement Co. v. Mass., 268 U. S. 212, 218;
Ozach Pipe Line Corp. v. Monier, 266 U. S. 561, 565.

IV.

As applied to appellee, Paragraphs 105 to 107 of the Illinois Corporation Act deny it the equal protection of

the laws, discriminating against it and in favor of other domestic and foreign corporations having like business and assets in Illinois, but a smaller amount of issued capital stock.

A state, in levying excises on corporations, cannot consistently, with the equal-protection-of-the-laws clause, discriminate in any way:

(a) Between foreign corporations of the same class which it has admitted into the state.

Air-Way Electric Appliance Co. v. Day, 266 U. S. 71;
Hanover Ins. Co. v. Carr, supra, 272 U. S. 494, Op. 510;
O'Gara Coal Co. v. Emmerson, 326 Ill. 18, at 32.

(b) Discriminate in any way against such foreign and in favor of domestic corporations.

Southern Ry. Co. v. Greene, 216 U. S. 400, 418.

(c) Nor discriminate between domestic corporations.
Royster Guano Co. v. Virginia, 253 U. S. 412.

As applied to appellee, the statute violates the equal protection clause, because the tax is not limited to that part of appellee's capital stock justly apportionable to the State of Illinois.

International Shoe Co. v. Shartel, 279 U. S. 429, 434.

A franchise tax against a foreign corporation and method of fixing the same must bear a reasonable relation to the value of the privilege granted.

Air-Way Elec. v. Day, supra.

Although having power to exclude foreign corporations, a state cannot limit entry on condition that such corporations waive any of their constitutional rights.

Looney v. Crane, 245 U. S. 178, Op. 187-8;
Western Union v. Kansas, 216 U. S. 1, Op. 47-8;
Pullman Co. v. Kansas, 216 U. S. 56, Op. 63-4;
Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, Op. 507;
Frost v. R. R. Comm., 271 U. S. 591, at 593-4, 599.

The franchise tax involved in this appeal is also much different than an incorporation fee exacted of a domestic corporation or its complement, an admission or "initial" fee exacted by the state from foreign corporations seeking admittance (there being but one collection of the tax), as to which different rules apply.

Hanover Ins. Co. v. Harding, 272 U. S. 494;
Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50;
People of State of New York v. Latrobe, 279 U. S. 421.

Authorities cited by appellant, which are distinguishable on the foregoing grounds, are:

General Ry. Signal Co. v. Va., 246 U. S. 500;

K. C., Ft. Scott & M. R. R. v. Kansas ex rel. Botkin, 240 U. S. 227;
K. C. M. & B. R. R. v. Stiles, 242 U. S. 111;
Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50.

Appellant's authority to issue stock or the number of shares it may have issued and outstanding does not depend upon the laws of Illinois. Its sole authority in that respect depends upon the laws of Missouri under which it was created.

Air-Way Electric Appliance Co. v. Day, 266 U. S. 71;
Roberts & Schaefer Co. v. Emmerson, 271 U. S. 50;
O'Gara Coal Co. v. Emmerson, 326 Ill. 18, at 32.

The Illinois Statutes prohibit appellee from acquiring other railroad properties without first securing a certificate of convenience and necessity from the Illinois Commerce Commission.

Smith-Hurd Statutes 1927, Chap. 111 2/3, Par. 56;
Cahill's Ill. Rev. Statutes 1927, Chap. 111a, Par. 71.

Under which statute, as construed by the Illinois courts, no certificate of convenience and necessity can be granted to an applicant as long as any other utility in the field is rendering adequate service.

Egyptian Transportation System v. Louisville & Nashville R. R., 321 Ill. 580;
Illinois Power & Light Corp. v. Illinois Commerce Commission, 320 Ill. 427.

ARGUMENT.

I.

Nature of the Tax.

Appellant states (Brief, p. 7) that the excise required by Sections 105 and 107 of the Illinois Corporation Act is a tax "for the right or privilege granted of doing business in that state during the next year."

At the risk of being over technical, we differ. By the clear provision of Illinois act (Sections 80, 81, 101) appellee paid "for" the right or privilege of doing business in Illinois at the time of its admission and at the time it paid the admission fee, the complement of the "initial" fee exacted of domestic corporations at the time of their organization.

This case involves an excise—"an annual license fee or franchise tax." It is a tax **on** or on the exercise of the privilege already granted of exercising corporate functions in Illinois, otherwise it would not be an excise. It is not in form or substance a price demanded by or paid to the State of Illinois in return for the right to be a corporation in Illinois—such a charge is covered by sections 80, 81 and 101 of the statute. Sections 105 and 107 are revenue-producing measures—laying an excise tax upon the exercise by appellant of a contract right previously granted.

It is settled that the authority of a state with regard to the levy of excises on foreign corporations which it has

heretofore admitted, is different from its authority with regard to their admittance into the state.

On admission the state may charge what it pleases for the granting of the right, the franchise, to be a corporation in the state, so long as it does not attempt to require the waiver of any constitutional rights or discriminate between applicants.

But, once admitted, the state has no such broad power as regards the levying of excise taxes on the privileges granted by it.

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal-protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality, as between the foreign corporation and the domestic corporation in that regard, does not come within the inhibition of the Fourteenth Amendment, but, after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind."

Hanover v. Carr, 272 U. S. 494, Op. 510-511.

II.

The Questions Involved in This Case.

We say, therefore, the question is not (as stated by appellant, Brief, p. 12) whether

> "the State may require a corporation organized or admitted to do business in the state, to pay a minimum fee or franchise tax, as provided in sections 105 and 107, **for granting it the privilege of doing business** in the state during the next year, although it may not have actually exercised its franchise in the state the preceding year to a sufficient extent to produce such an amount of tax at the rate specified in section 105."

Actually, the questions involved in this case are:

1. May the gross amount of the issued capital stock of a foreign corporation, consistently with the commerce and due-process clause of the Constitution, be made the measure of an annual excise exacted by the state, of a foreign corporation, before that time admitted into the state, irrespective of the amount of the capital stock of such corporation actually represented in the state?

2. May a state, consistently with the equal-protection-of-the-laws clause of the Constitution, exact an annual excise from a foreign corporation which it had previously admitted, basing said tax as to one corporation on its total issued stock, irrespective of the amount of said stock represented in the state, and as to other corporations, both

foreign and domestic, based on the proportion of their stock represented by property and business in the state, and resulting in the one corporation paying a larger tax on each dollar of its capital stock represented in the state than is paid on each dollar of the capital stock (represented in the state) of such other corporations?

3. Does a state statute exacting an annual excise of foreign corporations, measured and graduated according to the gross amount of the issued capital stock of such corporation and without regard to the amount thereof represented in the taxing state, consistently with the equal-protection-of-the-laws clause, require like fees for equal privileges held by all foreign corporations under the same circumstances?

III.

As to Appellee the Tax of One Thousand ($1,000.00) Dollars Resulting from the Application, Under the Proviso of Section 105 of the Scale of Minimum Amounts Provided by Section 107 of the General Corporation Act, Is Void, Being a Direct, as Well as Unreasonable, Burden on the Interstate Commerce Engaged in by It.

By virtue of clause 3 of Section 8 of Article I of the Constitution of the United States, the State of Illinois is prohibited from laying any direct or unreasonable tax on interstate commerce.

The reasoning of the Court in the case of Western Union Tel. Co. v. Kansas, 216 U. S. 1, is most pertinent,

notwithstanding the fact that the case may be said to involve an admission tax rather than a franchise tax. Prior to 1898, apparently no admission or franchise taxes were exacted by the State of Kansas from foreign corporations. Prior to that time the Western Union Telegraph Company had entered the state and was doing a local business. Legislation requiring foreign corporations to pay a "charter fee" of 1/10 of 1 per cent of authorized capital, as a condition of continuing a local business, was enacted in 1898. The Western Union Company resisted and invoked the protection of the commerce and due-process clauses.

The Supreme Court reasoned that as the whole of the capital stock represented the whole of the corporation's business, and as only a part of the corporation's capital, property and business was in Kansas, the tax on all of its capital stock was, of necessity, a tax on all of its property and all of its business, which included its interstate business. Wherefore the tax was in part a direct burden, a direct tax, on the corporation's business in interstate commerce, and therefore void. It is only where the burden is indirect or incidental that the commerce clause would not be violated unless the burden be unreasonable.

Here, as in the Western Union Company case, the tax is a direct burden on the interstate commerce conducted by appellee, because one hundred thirty-five and 21/100 ($135.21) dollars is the tax which would be due from appellee on the proportion of its capital stock represented by property owned and business done in Illinois. The

balance of its capital stock is represented by property and business in other states. The appellee demands eight hundred sixty-four and 79/100 ($864.79) dollars additional. If paid, then, of necessity, it is a tax and a direct burden upon all of appellant's property and business, including appellant's interstate commerce, and it is therefore void.

In the case of Looney v. Crane Co., 245 U. S. 178, this Court considered a statute of the State of Texas which levied an annual excise on foreign corporations graduated according to their authorized capitals, without regard to the amount thereof actually in the state, and determined such statute to be invalid because such taxes were direct burdens on interstate commerce, and, moreover, exerted the taxing authority of the state over property and rights which were wholly beyond the confines of the state and not subject to its jurisdiction, and, therefore, constituted a taking without due process.

The case of Air-Way Electric Appliance Co. v. Day, 266 U. S. 71, involved franchise tax based on the portion of the authorized stock of a foreign corporation (only a part of which was issued) represented by property owned and business done in the taxing state. It was held that the tax based on the authorized but unissued stock, of necessity, fell, in part, on issued stock which represented commerce between the states carried on by the corporation.

> "As some of the outstanding shares are represented by plaintiff's interstate business, the application of

the rate to all the shares, or to a number greater than the total outstanding, necessarily amounts to a tax and direct burden upon all the property and business, including the interstate commerce, of the plaintiff (International Paper Co. v. Massachusetts, supra, 142). We hold that the act violates the commerce clause" (Op. pp. 82-83).

Air-Way Electric Appliance Corp. v. Day, Op. 268 U. S. 71.

The actual effect of sections 105-107 of the Illinois statute is the same as the actual effect of the Ohio statute. The body of section 105 fixes a tax on the basis of property owned and business done in Illinois. The proviso of section 105 singles out a class of corporations (including appellee) and places an additional burden and tax on them—the scale of minimums provided by section 107. This additional burden and tax must, in part, fall on and directly burden appellee's commerce between the states.

If the State of Illinois had levied a tax based on the authorized stock of appellee (a part of which is unissued), it would be void. If the tax was based on any part (but not all) of the authorized but unissued stock, we do not believe the Court would have any hesitancy in declaring it to be void. Here, the tax is based, first, upon appellee's issued stock represented in Illinois, and then an additional amount is arbitrarily added thereto. There is no difference, in substance, between the decided cases and this.

These cases involved no tax scale graduated by the corporation's stock, as does this case. Recently, however, in the case of Cudahy Packing Co. v. Hinkle, 278 U. S. 460, this Court considered a state statute exacting an annual excise from corporations graduated according to the amounts of their authorized capital stock and with a fixed maximum. The tax was held void because not limited to that portion of the corporation's capital stock represented within the taxing state, it necessarily fell in part on the corporation's interstate business and on its property in other states.

Appellant will attempt to distinguish the Cudahy case on the ground that the scale of taxes was based on "authorized" capital stock, while in this case the scale is based on "issued" capital stock and, therefore, fell within the rule of the Air-Way case. If we correctly interpret the Court's opinion, such element was unimportant and the result would have been the same, even though the tax scale had been based on the "issued" stock. This is indicated because of the fact that the scale was based on authorized rather than issued stock, was not discussed as having any bearing on the case and in the last paragraph of its opinion the Court said:

> "Whether, because reckoned **upon authorized and not upon actual capital stock**, the challenged legislation fails to require like fees for equal privileges within the doctrine of Air-Way Electric case, we need not now consider" (Op., p. 467).

We most earnestly urge this case clearly falls within the principles of the decided cases and as applied to appellee, the Illinois statutes here involved, directly as well as unreasonably burden interstate commerce and are void.

IV.

Appellee Is Likewise Deprived of Its Property Without Due Process of Law, Within the Inhibition of the Fourteenth Amendment.

It is the well-established rule that a state cannot, consistent with the due-process clause, levy a tax on property without its territorial limits.

The rule was first applied to a tax on the capital stock of a corporation in the case of Western Union Tel. Co. v. Kansas, 216 U. S. 1, where the Court held void a Kansas statute requiring foreign corporations, which had been doing business in Kansas, as a condition of continuing to do a local business, to pay a fixed (one-tenth of 1 per cent) per cent of their authorized capitals. Domestic corporations were required to pay the same fees. The statute was held to deprive the Western Union Telegraph Company of property without due process of law. The Court properly reasoned that the corporation's capital stock represented all of its property situated in other states, as well as in Kansas, and, hence, a tax based on all of the capital stock was a tax on all of its property located in all such states, violating the due-process clause.

So here, as the Illinois statute is applied to appellee, its property located without the State of Illinois is subjected to an Illinois tax. For appellee's tax, based on the proportion of its issued stock, represented by property and business in Illinois, would be one hundred thirty-five and 21/100 ($135.21) dollars. That sum would be the amount of tax on appellee's property and business in Illinois. The State of Illinois demands eight hundred sixty-four and 79/100 ($864.79) dollars more. Such additional exaction must necessarily fall on that portion of appellee's stock which represents its business and property, located elsewhere, and the tax is void under the due-process clause.

The theory of the case of Western Union Tel. Co. v. Kansas has been reaffirmed and applied in

Ludwig v. Western Union Tel. Co., 216 U. S. 146;
A. T. & S. F. Ry. v. O'Connor, 223 U. S. 280;
Looney v. Crane Co., 245 U. S. 178;
International Paper Co. v. Mass. 246 U. S. 135;
Air-Way Elec. App. Corp. v. Day, 266 U. S. 71;
Cudahy Packing Co. v. Hinkle, 278 U. S. 460.

V.

Sections 105-107 of the Illinois Corporation Act, on Their Face, as Well as in the Application, Act to Deprive Appellee of the Equal Protection of the Laws.

The Circuit Court of Appeals did not find it necessary, in its opinion, to discuss the third, and, we believe, the

strongest, ground upon which appellee assailed the Illinois statute.

That the effect of the Illinois statutes was to deprive appellee of the equal protection of the laws, was charged in the bill of complaint (Rec., p. 7); discussed in the opinion of the District Court (Rec., p. 34); and assigned by appellee was error in the Circuit Court of Appeals (Rec., p. 40).

As applied to annual franchise taxes, it has been specifically held that a state cannot consistently, with the equal-protection-of-the-laws clause, discriminate in any way.

(a) Between foreign corporations of the same class, which it has admitted into the state.

Air-Way Electric Appliance Co. v. Day, 266 U. S. 71;
Hanover Ins. Co. v. Carr, 272 U. S. 494, Op. 510;
O'Gara Coal Co. v. Emmerson, 326 Ill. 18, Op. 32.

(b) Discriminate, in any way, against such foreign, and in favor of domestic, corporations.

Southern Ry. Co. v. Greene, 216 U. S. 400, 418.

(c) Nor discriminate between domestic corporations.

Royster Guano Co. v. Virginia, 253 U. S. 412.

The statute, on its face, as well as by its application to appellee, discriminates against appellee and in favor of

other corporations, foreign and domestic, who are assessed and pay a franchise tax of 5 cents per $100 on that portion of their issued capital stock represented by property and business in Illinois.

Appellant will possibly contend the amount of issued stock bears a fair relation to value of the franchise, heretofore granted, to do business in Illinois and that the annual excise may be based thereon. This may be so. But the ratio of property owned and business annually done bears a more true relation to the value of the appellee's franchise, secured at the time of its admission, and the state discriminates against appellee by taxing some corporations on the one basis (the one having a real direct and more true relation to the value of the privilege) and taxing appellee a proportionately greater amount on a more remote, arbitrary and less true basis.

On its face, therefore, the statute is discriminatory because it fixed two "bases" for a franchise tax, which, when applied, assess taxes in different amounts, acting more favorably towards some corporations and less favorably towards others, including appellee.

Not only do the statutes on their face discriminate against appellee, but, in their application, appellee is discriminated against.

The Chancellor correctly outlines the basis of the discrimination when he says:

> "Plaintiff complains that it is discriminated against because another corporation with an issued capital

stock of $270,423.00, and having all of its property and business in Illinois, would be required to pay a tax of but $135.21, yet the State of Illinois insist upon plaintiff paying a sum of $1,000.00 for doing the same amount of business and having the same amount of property in the State of Illinois. It similarly complains because another corporation, with a capital stock of $1,000,000.00, and $270,423.00 of that capital represented in Illinois, would pay only $135.21, while plaintiff is required to pay $1,000.00" (Rec., p. 36).

The Chancellor then says that appellee is not discriminated against, in effect, because all corporations with the same issued stock as it, and, having the same property and business in Illinois as it, would pay the same tax: and that if appellee had issued stock in a smaller amount it would not be compelled to pay any greater tax than the smaller corporation (Rec., p. 36).

In effect, this amounts to saying: "It is true, the State discriminates against you, but you cannot complain, as the State also discriminates against every corporation which has a large issued capital and a small business in Illinois." This is not a sound answer to the charge. The fact that others are wronged does not make right the wrong done appellee.

To justify this statute, appellee, by reason of its large issued capital, must be in receipt **from the State of Illinois** of some actual and substantial privilege or advantage which other corporations, with smaller issued capital, but

with equal property and business and paying less or proportionately less, do not receive.

Is there any fair basis or justification for this discrimination?

Reasonableness of Classification.

All classifications for taxation, to be valid, must be on a reasonable, fair and nondiscriminatory basis, with a reasonable relation to the purpose for which the classification is made. Is there any fair reason for taxing a big corporation more on the privilege of doing the same amount of business than is exacted of a small corporation?

This difference of treatment cannot be justified as resulting from a proper classification.

> "It is unnecessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the states from resorting to classification for the purposes of taaxtion. Numerous and familiar decisions of this Court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon the grounds of policy" (Op. 415).
>
> "It is obvious that the ground of difference upon

which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect, and none the less because it is probable that the unequal operation of the taxing system was due to inadvertence rather than design" (Op. 416).

Royster Guano Co. v. Virginia, 253 U. S. 412.

"It remains to consider the argument made on behalf of the State of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the Fourteenth Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the state is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the state. While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed, and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

Southern R. Co. v. Greene, 216 U. S. 415, Op. 417.

What benefit or privilege, desired or sought by appellee, does it receive from the State of Illinois which all other foreign corporations do not also receive?

Appellee's right to be a corporation with authority to issue a certain amount of capital stock, to engage in a certain business, and its invested powers, are all granted to it by Missouri, the state of its incorporation.

> "The state, which grants the franchise to be a corporation and authority to issue capital stock, may charge the corporation with an initial fee and an annual franchise tax upon the amount of the capital stock which it grants authority to issue, but it cannot charge a foreign corporation with such fee or tax for the privilege of transacting business within the state based upon its authorized capital. The authority of the foreign corporation to issue stock or the amount of stock it may have outstanding, does not depend upon the laws of Illinois, but upon the laws of the state in which it was organized."
>
> O'Gara Coal Co. v. Emmerson, 326 Ill. 18 (Op. 32).

The sole right which appellee sought from or received from the State of Illinois was to enter that state and do a local business.

At the time of its admission appellee received this right from the State of Illinois.

Section 80 of the Illinois statute requires foreign corporations, before transacting business in the state, to secure a "Certificate of Authority"—that is to be **admitted.** Sec-

tion 81 provides the form of application to the Secretary of State for such certificate, and on execution thereof the Secretary of State is advised of the proportion of its issued capital which the applicant expects to bring into Illinois. An initial or admission fee on the basis of the capital expected to be brought into Illinois and the first year's franchise tax is required to be paid. (See sections 101 and 129.)

When once admitted, we say the foreign corporation becomes a quasi-corporate citizen of Illinois, in substance, with an issued stock in the amount on which it has paid the admission tax. Each year the foreign corporations make an annual report (Sec. 106) disclosing the amount of its issued capital represented by property and business in the state during the preceding year, and if the corporation has brought more of its capital into the state than that on which it had previously paid admission fees, then an admission fee on the additional capital is charged.

After admission of a foreign corporation the state cannot impose an annual franchise tax, where the sole business conducted by the corporation within the confines of the state was in interstate commerce.

Ozark Pipe Line Corp. v. Monier, 266 U. S. 561, Op. 565;

Alpha Portland Cement Co. v. Mass., 268 U. S. 212, Op. 218.

Yet appellant says (Brief 7) the state may **assume** appellee will bring in sufficient of its capital stock to produce the minimum franchise tax provided in section 107. By what right or reason may the state so assume. If such were the fact, then section 107 would be without necessity or reason—for if, in fact, all corporations with big capitals would bring such proportions of their stock into the state, then section 107 would be without purpose. Furthermore, the annual report filed by appellee informed the state that there was not any basis for such assumption. Certainly the state cannot base a franchise tax on the assumption that the corporation will bring an additional part of its capital into the state before the corporation has applied for the admission of same, paying the additional admission fee, or actually brought such additional capital into the state; and in this particular instance the corporation is a railroad utility, which by the laws of the state cannot extend its line of railroad without a certificate of convenience and necessity first being granted by the Commerce Commission. (See Brief, p. 11, ante.)

It is pleaded in the bill of complaint that appellee is an interstate carrier by railroad, subject to and operating under the provisions of the Transportation Act (Rec., p. 3), and the Illinois Commerce Act. It cannot abandon its properties in Illinois and cease their operation without first obtaining a certificate of convenience and necessity from the Interstate Commerce Commission.

It cannot build or acquire other properties in Illinois

without first securing a certificate of convenience and necessity from the Interstate Commerce Commission. It operates a railroad property located in a number of states and must unavoidably have a large issued capital stock, only a portion of which it can employ in Illinois. We insist that as to all corporations, and particularly as to corporations in appellee's situation, the right to do a local business in Illinois has no value beyond the actual use thereof, which the recipient can or desires to make. To say that the State of Illinois may require such a foreign corporation to pay a franchise tax actually based on a greater part of its issued capital than is actually represented by property and business in the state, or on a greater proportion (than that represented by property and business) of its issued capital than it can or desires to bring into the state, or else pay a franchise tax based upon such portion of its capital falls flat of its own absurdity.

Appellant speaks of the State of Illinois granting "privileges each year in advance" (Brief 13). Such is not the actual effect and operation of the statute.

As pointed out in the statement (pp. 4, 5, ante), the tax in question is computed on appellee's annual report of property owned and business done in the calendar year 1926.

The tax is levied for the privilege of doing a local business during the year beginning July 1, 1927, and ending June 30, 1928.

Clearly, the, if during the calendar year of 1927 or dur-

ing the year July 1, 1927, to June 30, 1928, appellee should bring additional property and business into Illinois, it would have no relation to or in anywise be attributable to its payment of the tax here involved. Such subsequent importation of capital and business would only have effect by increasing its tax for the following years.

Although appellant does not refer to section 101 of the statute (in his printed brief), we anticipate the contention that it requires the payment of all subsequent franchise taxes as a condition of admission into Illinois. This section providing:

> "Each foreign corporation for pecuniary profit, other than an insurance company or building and loan company, in addition to the annual franchise fees and taxes hereinafter provided, shall pay to the Secretary of State for its certificate of authority to do business in Illinois the same fees provided by this act to be paid by a similar corporation incorporated under the laws of this state. Each foreign corporation heretofore or hereafter admitted to do business in this state shall also pay for increases in the amount of capital stock represented in Illinois, for extension of existence, consolidations, mergers and for filing amendments the same fees required to be paid by corporations organized under the laws of this state. All such fees shall be based upon the proportion of its issued capital stock represented by business transacted and property located in Illinois. Whenever it shall appear that the amount of capital stock represented in Illinois is greater than the amount theretofore paid by

> any foreign corporation, such corporation, before it shall continue to transact business in Illinois, shall pay to the Secretary of State upon such excess the same fees that a domestic corporation must pay upon an increase in capital stock equal to the amount of such excess."

We contend the requirement that a foreign corporation,

> "in addition to the annual franchise fees and taxes hereinafter provided, shall pay to the Secretary of State for its certificate of authority to do business in Illinois the same fees provided by this act to be paid by a similar corporation incorporated under the laws of this state,"

refers to franchise taxes for the first year or the balance of the first year following admittance. (See Section 129.)

This is indicated by section 92, which provides:

> "Sec. 92. The certificate of authority of a foreign corporation, subject to the provisions of this act, may be revoked by the Secretary of State:
>
> "6. Upon failure, neglect or refusal to file an annual report, as required by this act, or upon failure, neglect or refusal to pay the franchise tax assessed against it on or before the 31st day of July of the year in which such franchise tax becomes due and payable."

Furthermore, if the payment of all future excises levied against appellee, whether or not they violated constitu-

tional requirements, was, by reason of section 101, a condition of admission into Illinois, then we invoke the principle that a state may not, as a condition of admission, require a foreign corporation to submit to any such unconstitutional levy. This was settled by the case of Looney v. Crane, 245 U. S. 178.

> "The sole contention, then, upon which the acts can be sustained, is that, although they exerted a power which could not be called into play consistently with the Constitution of the United States, they were yet valid because they also exercised an intrinsically local power. But this view can only be sustained upon the assumption that the limitations of the Constitution of the United States are not paramount, but are subordinate to and may be set aside by state authority as the result of the exertion of a local power. In substance, therefore, the proposition must rest upon the theory that our dual system of government has no existence, because the exertion of the lawful powers of the one involves the negation or destruction of the rightful authority of the other. But original discussion is unnecessary, since to state the proposition is to demonstrate its want of foundation, and because the fundamental error upon which it rests has been conclusively established. Indeed, the cases referred to were concerned in various forms with the identical questions here involved, and authoritatively settled that the states are without power to use their lawful authority to exclude foreign corporations by directly burdening interstate commerce as a condition of permitting them to do business in the state, in violation of the Constitution, or, because of

> the right to exclude, to exert the power to tax the property of the corporation and its activities outside of and beyond the jurisdiction of the state, in disregard, not only of the commerce clause, but of the due-process clause of the Fourteenth Amendment" (pp. 187-188).

Appellant urges that the Illinois statutes are intended to impose only a reasonable minimum charge upon all corporations, both foreign and domestic, for maintaining the privilege granted of doing a local business in the state during the next ensuing year.

A "minimum charge" is often permitted to cover the cost of bookkeeping, collection of tax and the administration of the act. It is usually a nominal amount. It could not reasonably vary according to the issued capitals of the franchise taxpaying corporations. As indicated by section 107 of the statute, this minimum tax should not be over $10.00, that being the minimum amount payable by a corporation having a capital stock of less than $50,000.00.

The Franchise Tax Demanded of Appellee Has No Fair Relation to the Value of the Privilege Asked and Received by Appellee.

Any annual franchise or privilege tax (assuming it is not discriminatory), exacted of foreign corporations, must have a reasonable relationship to the value of the privilege granted. It must require like fees for equal privileges.

The equal protection of the laws requires that such franchise tax must have a fair relation to value of the privilege for which it is imposed. If it be arbitrary or lacks such reasonable relationship it is void.

In the Air-Way Electric case this Court said:

> "The fee determined by the lower court, as well as that fixed by the state officers, is arbitrary. Without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement" (Op. 83).
>
> Air-Way Electric Appliance Co. v. Day, 266 U. S. 71.

The tax is **"not limited to the part of the capital stock justly apportioned to the taxing state."**

International Shoe Co. v. Shartel, 279 U. S. 434.

As applied to appellee and weighted by such a test, sections 105-107 of the Illinois statute require appellee to pay a franchise tax which has no fair and reasonable relation to the value of the privilege granted, and the tax is not limited to that part of appellee's capital justly apportioned to Illinois.

V.

General Railway Signal Co. v. Virginia, and Similar Cases, Distinguished.

Appellant cites the case of Baltic Mining Co. v. Mass., 231 U. S. 68, which involved a statute imposing an annua

excise of one-fiftieth of 1 per cent of corporation's authorized capital, with a maximum limit of $2,000.00 on corporations with an authorized capital of $10,000,000.00 or more. The tax was held not to fall upon the stock because of the fixed **maximum**, which limited the amount of the tax when, on the basis of one-fiftieth of 1 per cent, it might have been larger.

With reference to the Baltic case, this Court recently said:

> "It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clause, and the Fourteenth Amendment does not permit taxation of property beyond the state's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 87, 58 L. ed. 127, 134, 34 Sup. Ct. Rep. 15, tends to support a different view, it conflicts with conclusions reached in later opinions, and is now definitely disapproved."
>
> Alpha Portland Cement Co. v. Massachusetts, 268 U. S., p. 218.

The appellant also relies on the case of General Railway Signal Company v. Virginia, 246 U. S. 500.

That case is clearly not applicable. It involved a different kind of tax, viz., an initial or admission tax, against

which the only contention made was that it unreasonably burdened interstate commerce. The State of Virginia apparently did not exact any annual franchise or license fees. The initial tax was payable at the time the foreign corporation was admitted. For lack of a more true and better basis for the tax, the Court sustained an admission tax based on a scale of fees not varying directly in proportion to the authorized capital stock of the corporations admitted, and which had a fixed **maximum** amount. The Court could not say it was a tax on the corporation's capital stock, which represented property and business in several states, as it did not vary in direct proportion to that stock, and a maximum tax was fixed, which there and in the case of Baltic Mining Co. v. Massachusetts, 231 U. S. 68, tended to keep down the amount of the tax which was paid by the contesting corporations. The maximum therein fixed was held to save the statute, as it limited or diminished the amount of the tax to a certain **maximum**. It is a very different thing in operation to section 107 of the Illinois statute, which acted to increase the tax by fixing a scale of **minimums**. This particular difference between the two types of statutes was pointed out by your Honors in the case of Looney v. Crane Co., supra, where, with reference to the limitation on the amount of the tax (by reason of which the tax was sustained in the Baltic Mining Company case), it was said:

> "In the second place, in making the inquiry stated in all of the cases, the compatibility of the statutes

with the Constitution, which was found to exist, resulted from particular provisions contained in each of them, which so qualified and restricted their operation, and necessarily their effect, as to lead to such result. A. These conditions related to the subject matter upon which the tax was levied, or to the amount of taxes in other respects paid by the corporations, or limitations on the amount of the tax authorized, when a much larger amount would have been due upon the basis upon which the tax was apparently levied.''

Looney v. Crane Co., 245 U. S. 178 (Op. 190).

The Illinois statute, therefore, does not possess the saving quality of the Massachusetts statute involved in the Baltic Mining Co. case, or the Virginia statute involved in the General Railway Signal Co. case. It acts directly opposite to the Massachusetts statute. The Massachusetts statute decreases or limits ''the amount of the tax authorized, when a much larger amount would have been due upon the basis upon which the tax was apparently levied,'' viz., one-fiftieth of 1 per cent of the corporation's capital (if one-fiftieth of 1 per cent amounted to more than $2,000.00, the tax was nevertheless limited to that sum). The Illinois statute increases ''the amount of the tax * * * which would have been due upon the basis upon which the tax was apparently levied,'' viz., one-twentieth of 1 per cent of that portion of the corporation's stock represented by its property and business in Illinois. If one-twentieth of 1 per cent did not amount to

the minimum fixed by section 107, the amount of the tax was raised to that minimum.

The case of Cheney Bros. v. Massachusetts, 246 U. S. 147, involved the same statute and the same principles as the Baltic case.

In those cases no question of discrimination voiding the tax under the equal-protection-of-the-laws clause was raised by the parties or considered by the Court.

In this connection the Court is familiar with the rule that questions (particularly constitutional questions), not specifically raised and urged, will not be considered or passed on by the Court.

> James W. Lusk, Receiver, v. Botkin, 240 U. S. 230;
> Chic. I. & L. Ry. v. Hatchett, 228 U. S. 559.

And persons not adversely affected by the particular operation of a statute, by reason of which its unconstitutionality is charged, cannot raise the point.

> Roberts & Schaeffer v. Emmerson, supra.

The Court's opinion in the General Railway Signal case states:

> "It seems proper, however, to add that this case is on the borderline" (Op., p. 511).

The Virginia statute did not provide a fee for some corporations, measured by their property and business in the

state, and a fee for others, measured by their issued capitalization, thereby discriminating between such two classes of corporations.

The General Railway Signal Company case holds only that an entrance fee of $1,000.00, exacted of a foreign corporation for privilege of doing a local business, standing alone, is not a direct tax on interstate commerce and was not, under the circumstances, so arbitrary as to amount to an unreasonable burden on interstate commerce.

The cases of Kansas City, Ft. S. & M. Ry. Co. v. Kansas, 240 U. S. 227; K. City, M. & B. R. R. v. Stiles, 242 U. S. 111; Roberts & Schaeffer Co. v. Emmerson, 271 U. S. 50, are clearly distinguishable on the grounds that the complaining corporations were **domestic corporations**, which received from the taxing states the right (among others) to be a corporation.

> "Examining the statute in the present case, we see no reason to doubt the accuracy of the description of the tax by the state court. We take it to be simply a tax on the privilege of being a corporation—on the primary corporate franchise granted by the state. The authority of the state to tax this privilege, or franchise, has always been recognized, and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the state's taxing power."
>
> Kansas City, Ft. S. & M. Ry. v. Kansas, 240 U. S. 230 (Op., p. 232).

"The tax is not of the character condemned in Western Union Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. Rep. 190, and kindred cases. In the latter case a tax of large amount was imposed upon a foreign corporation engaged in interstate commerce for the privilege of doing local business within the state. Under the circumstances therein disclosed and the character of the business involved, this Court held that the statute was, in substance, an attempt to tax the right to do interstate business, and to tax property beyond the confines of the state, and was therefore void. Here a franchise tax is levied upon a corporation consolidated under the laws of the state by its own acceptance of that law in incorporating under it."

Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111 (Op., p. 118).

The case of Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S. 290, involved only the question of the manner of computing the proportion of the foreign corporation's stock represented by property and business in Illinois; the Court holding that the aggregate amount of interstate sales effected from the company's place of business in Illinois was properly included as business done in Illinois; such inclusion affecting interstate commerce only incidentally and indirectly, saying:

"Taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed" (Op., p. 294).

In that case the Illinois statute was not attacked on the same grounds as was the Ohio statute in the case of Air-Way Elec. Co. v. Day, viz., that a tax on part of the corporation's unissued stock acted to deprive it of the equal protection of the law, etc. If the question had been raised, then, in view of the subsequent action of the Court in the Air-Way case, a different result would have been reached. The Supreme Court of Illinois, after sustaining this statute in

> American Can Co. v. Emmerson, 288 Ill. 297;
> Hump Hairpin Co. v. Emmerson, 293 Ill. 389;
> Armstrong v. Emmerson, 300 Ill. 54;

later, when the equal-protection-of-the-laws objection was called to its attention, held the statute to be invalid.

> O'Gara Coal Co. v. Emmerson, supra.

This most aptly illustrates appellant's error in calling attention to a certain statute, and then stating that the Court sustained the statute, without setting forth the specific questions raised and considered by the Court.

The case of Hump Hairpin Co. v. Emmerson is similar on principle to three other cases cited by appellant, namely:

> Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113;
> U. S. Glue Co. v. Oak Creek, 247 U. S. 321;
> Peck v. Lowe, 247 U. S. 165,

which hold only that an income tax, levied on the **net** income of a foregin corporation earned within the state (a part being earnings on interstate commerce), is not a direct or (in those cases) an unreasonable burden on interstate commerce. An income tax on the **gross** income earned by such corporation in interstate commerce, would be a direct burden, and hence void.

In Postal Tel. Co. v. Adams, 155 U. S. 688, cited by appellant, this Court held that, in lieu of property taxes on telegraph lines, a state could exact the equivalent thereof in the form of a franchise tax.

VI.

The United States Circuit Court of Appeals Did Not Misconceive the Nature and Effect of the Tax.

On page 21 of his brief, appellant quotes an excerpt from the opinion of the Circuit Court of Appeals in this case. This excerpt was contained in the opinion before rehearing; after rehearing, the following was substituted:

> "In short, it offered to pay 5 cents on each $100.00 of that part of its capital stock which was ascertained by applying said section 105."
>
> See the opinion as published in 30 Fed. Rep. (2d Series) 322, at 323.

That the Court correctly understood the nature and effect of the tax, is clearly indicated by the whole of the opinion.

Furthermore, the judgment, not the reasoning of the Court, is a matter here for review.

VII.

For the foregoing reasons, appellee respectfully insists that the judgment of the Circuit Court of Appeals for the Seventh Circuit, reversing the judgment of the United States District Court for the Southern District of Illinois, should be affirmed.

Respectfully submitted,

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APPENDIX.

All references are to

Chapter 32, Cahill's Revised Statutes 1927;
Chapter 32, Smith-Hurd Revised Statutes 1927.
Section numbers are identical in both volumes.

Sec. 80. **Certificate of Authority to Do Business—Requirement as to Payment of Capital Stock.**—Each foreign corporation organized for pecuniary profit (except banking, insurance, building and loan and surety companies), not now licensed to do business in this state, shall, before it transacts any business or maintains an office in this state, procure a certificate of authority therefor from the Secretary of State. No certificate shall issue to any foreign corporation authorizing it to transact business in this state until the same amount is paid on each share of stock issued or to be issued as is required of like corporations organized under the laws of this state.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 81. **Filing Application With Secretary of State—Contents.**—A foreign corporation desiring a certificate of authority hereunder shall file in the office of the Secretary of State:

(1) A copy of its charter duly authenticated by the proper officer of the state or country where it is incorporated;

(2) A statement verified by its president and secretary or other officer setting forth:

(a) The name of such corporation and the location of its principal office or place of business without this state,

and the location of the proposed principal office or place of business in this state;

(b) The names of the states in which it has qualified to do business under the corporation laws thereof;

(c) The character of business which it intends to carry on in this state;

(d) An itemized estimate of the amount of tangible property to be employed by it in the state during the first year next after the date on which it shall be licensed and begin to do business in this state;

(e) An estimate of the total amount of the capital to be employed by it in this state and an estimate of the total amount of capital to be employed by it elsewhere during such year, itemized as follows:

(1) The value of patent rights, licenses, franchises, trade-marks, secret processes, copyrights and good will.....$.....

(2) Contracts or choses in action.....$.....

(3) Merchandise, raw materials and goods in process of manufacture.....$.....

(4) Book accounts and notes.....$.....

(5) Machinery and real estate.....$.....

(6) Stock in other corporations and securities.....$.....

(7) Furniture, fixtures, stationery and like articles.....$.....

(8) Cash in bank.....$.....

(9) Kinds and amount of other personality (personalty).....$.....

(f) An estimate of the annual business to be transacted by the corporation everywhere;

(g) An estimate of the annual business to be transacted at or from places of business in Illinois;

(h) The name and address of some person permanently residing in this state, upon whom, as the resident agent of the corporation until his successor shall have been appointed, service of legal process may be had, and the names and addresses of the officers and directors;

(i) Such other information touching the property and business of the corporation as the Secretary of State may require;

In the case of telegraph, telephone, cable, railroad or pipe line corporations, in addition to the itemized estimate of the total amount of capital to be employed in this state, there shall be given the total length of such telephone, telegraph, cable, railroad or pipe line, and the length of the line located in this state and the total value of such line and the value of such line in this state.

Sec. 92. **Revocation of Certificate of Authority to Do Business—Grounds.**—The certificate of authority of a foreign corporation, subject to the provisions of this act, may be revoked by the Secretary of State:

(1) Upon failure of an officer, director or manager, to whom interrogatories are propounded, to answer the same fully and to file such answer in the office of the Secretary of State within thirty days after the mailing of the same;

(2) If such corporation is transacting no business in Illinois and has no tangible property in this state;

(3) If the answer to interrogatories propounded by the Secretary of State discloses, or if the fact is otherwise ascertained, that the proportion of the capital stock of such corporation represented in this state is greater than the amount theretofore paid upon by such corporation and the deficiency in such fees is not paid within thirty days

of the receipt of a notice sent by mail to the president and secretary, or to the statutory agent of such corporation of record in this state, or to the attorney filing the interrogatories for such corporation, or is not paid within such extension of time as may be granted by the Secretary of State;

(4) Upon failure of such corporation to keep on file in the office of the Secretary of State duly authenticated copies of each instrument amending its charter;

(5) Upon failure of such foreign corporation to appoint and maintain an agent in this state upon whom service of legal process may be had;

(6) Upon failure, neglect or refusal to file an annual report as required by this act, or upon failure, neglect or refusal to pay the franchise tax assessed against it on or before the thirty-first day of July of the year in which such franchise tax becomes due and payable;

(7) Upon failure, neglect or refusal to file a certificate of issuance of stock and the payment of the fees required by this act.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 94. **Unlicensed Foreign Corporation Doing Business in State—Actions and Suits by—Penalties—Recovery.**—No foreign corporation doing business in this state without a license shall be permitted to maintain any suit at law or in equity in any of the courts of this state upon any demand, whether arising out of contract or tort; and all such corporations shall be liable by reason thereof to a penalty therefor of not less than two hundred and fifty dollars nor more than one thousand dollars, to be recovered in any court of competent jurisdiction, in a civil action to be begun and prosecuted by the Attorney-General.

Sec. 96. **Incorporation Fee—Increase of Capital—No-par-value Stock, Basis of Fee—Public Utility Corporations.**—The Secretary of State shall charge and collect an initial fee of one-twentieth of one percentum upon the amount of the capital stock which the corporation, has issued or it proposes to issue at once, but in no case shall such fee be less than twenty dollars, and a like fee of one-twentieth of one percentum upon filing a certificate of any subsequent issue or increase of capital stock and, in addition thereto, the same fee as that required for filing other certificates of amendment. In the event that the corporation has capital stock of no-par value, its shares, for the purpose of fixing the fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares. Each public utility corporation, including railroads, shall pay to the Secretary of State the same fees as are required to be paid for incorporation by other corporations organized for pecuniary profit.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 101. **Foreign Corporations—Fees for Certificate of Authority—On Increase of Stock—On Extensions, Consolidations, Mergers, Amendments—Basis of Fees—Where Capital Stock Without Par Value.**—Each foreign corporation for pecuniary profit, other than an insurance company or building and loan company, in addition to the annual franchise fees and taxes hereinafter provided, shall pay to the Secretary of State for its certificate of authority to do business in Illinois, the same fees provided by this act to be paid by a similar corporation incorporated under the laws of this state. Each foreign corporation heretofore or hereafter admitted to do business in this state, shall

also pay for increases in the amount of capital stock represented in Illinois, for extensions of existence, consolidations, mergers and for filing amendments the same fees required to be paid by corporations organized under the laws of this state. All such fees shall be based upon the proportion of its issued capital stock represented by business transacted and property located in Illinois. Whenever it shall appear that the amount of capital stock represented in Illinois is greater than the amount theretofore paid upon by any foreign corporation, such corporation, before it shall continue to transact business in Illinois, shall pay to the Secretary of State upon such excess the same fees that a domestic corporation must pay upon an increase in capital stock equal to the amount of such excess.

If a foreign corporation has a capital stock of no-par value, its shares, for the purpose of estimating the amount of fees and taxes to be paid hereunder, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 102. **Annual Reports—What Corporations Required to Make—Time for Making—Contents—Verification—Publication of List of Reporting Corporations—Copy to Recorder of Deeds.**—Each corporation, including railroads, domestic and foreign, other than homestead associations, building and loan association[s], banks, religious corporations, insurance companies, and corporations not for pecuniary profit, shall make a report in writing to the Secretary of State between the first day of February and

the first day of March of each year on forms to be prescribed and furnished by the Secretary of State. That part of the annual report relating to property and business shall be made as for the calendar year ending December thirty-first preceding (except in case the corporation keeps its accounts on the basis of a fiscal year not identically with the calendar year it shall make report for the fiscal year next preceding February first of the year in which such report is made. The other information required in such report shall be given as of the date of execution of such report. In case the corporation has not been in existence a year it shall furnish the Secretary of State the information required for the period since it was incorporated or admitted. Such report shall give the address of the corporation, officers and directors in this state by street and number. Such annual report shall also disclose such facts as are necessary to enable the Secretary of State to ascertain the proportion of its capital stock represented by business transacted and tangible property located in this state, and such other information as may be necessary or appropriate in order to assess the annual license fee or franchise tax. Such report shall be verified by the oath of the president, vice-president, secretary, assistant secretary or treasurer of the corporation, but in case the corporation is in the hands of an assignee, receiver or trustee then such report shall be signed and verified by such assignee, receiver or trustee.

The Secretary of State shall on or before the 15th day of January of each year forward to each corporation of record in his office a copy of the forms to be used in making the report specified in this act, but the failure to send or to receive such forms shall not relieve the corporation from the duty of making such report.

The Secretary of State shall publish on or before Sep-

tember first of each year a list of corporations filing an annual report in accordance with the provisions of this act, with the names and addresses of the president and secretary of domestic corporations or the agent for service of legal process of foreign corporations, and shall furnish a copy thereof to each Recorder of Deeds.

Sec. 105. **Annual License Fee or Franchise Tax—Amount —Minimum—No-par-value Stock.**—Each corporation for profit, including railroads, except insurance companies, heretofore or hereafter organized under the laws of this state or admitted to do business in this state, and required by the act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this state, but in no event shall the amount of such license fee or franchise tax be less than that required by this act of corporations having no property or business in this state.

In the event that the corporation has stock of no-par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares.

As amended, L. 1927, p. 354, approved and in force May 12, 1927.

The 1927 amendment carried an emergency clause, as follows:

Sec. 2. Whereas, the Supreme Court of this state has held that certain sections of the General Corporation Act, which based the fees on the authorized capi-

tal stock, are unconstitutional as to foreign corporations;

Whereas, under the decision of the Supreme Court the Secretary of State will not be able to collect the fees from corporations to which the state is entitled and, further, that all of the annual franchise tax provisions of said act are in danger of being invalidated unless said sections are amended, and,

Whereas, the Secretary of State is, under the provisions of section 112 of the aforesaid act, obliged to mail notice between the first day of February and the fifteenth day of May, in writing, to each corporation against which a franchise tax or fee is assessed, notifying such corporation of the amount of franchise tax or fee assessed against it for the year next ensuing, commencing on July first, and,

Whereas, unless this act becomes effective on or before May fifteenth the state will lose the fees from corporations to which the state is justly entitled;

Therefore, an emergency exists and this act shall take effect and be in full force from and after its passage.

L. 1927, pp. 359-60.

Sec. 106. **Ascertainment of License Fee or Franchise Tax in Case of Corporations Generally.**—In ascertaining the amount of the issued capital stock represented by business transacted and property located in this state, the sum of the business of any foreign or domestic corporation transacted in this state and the total property of such corporation located within this state shall be divided by the sum of the total business of the corporation and the total property of the corporation wherever situated.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 107. —— **Basis in Case of Corporation Without Property in State and Doing No Business in State—Where Stock of No-par Value.**—In case it appears from the annual report that the corporation has no property located in this state, and is transacting no business in this state, the following fees shall be paid annually to the Secretary of State as an annual franchise tax: All such corporations having issued capital stock of $50,000 or less shall pay an annual fee of $10; corporations having issued capital stock of more than $50,000, but not exceeding $200,000, shall pay an annual fee of $15; corporations having issued capital stock of more than $200,000, but not exceeding $500,000, shall pay an annual fee of $20; corporations having issued capital stock of more than $500,000, but not exceeding $1,000,000, shall pay a fee of $50; corporations having issued capital stock of more than $1,000,000, but not exceeding $10,000,000, shall pay a fee of $200; corporations having issued capital stock of more than $10,000,000, but not exceeding $20,000,000, shall pay a fee of $500; and all corporations having issued capital stock in excess of $20,000,000 shall pay an annual fee of $1,000.

In the event that the corporation has stock of no-par value, its shares, for the purpose of fixing such fee, shall be taken and considered at the amount of the consideration received or to be received by such corporation for such shares.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 108. **When Franchise Tax Payable.**—The franchise tax herein provided to be paid shall be due and payable on the first day of July of each year and shall be the franchise tax for the year commencing on the first day of

July in which it is due and ending on the thirtieth day of June next thereafter.

Sec. 109. **Assessment of Tax From Annual Report—Corporations Organized Between January 15 and March 1.**—The Secretary of State shall, from the annual report filed, assess a tax at the rates herein prescribed against each corporation required herein to make an annual report.

The Secretary of State shall, from the best available information, also assess such tax on all corporations organized or admitted between the fifteenth day of January and the first day of March.

Sec. 112. **Notice of Amount of Franchise Tax—Contents —Failure to Receive.**—Between the first day of February and the fifteenth day of June, of each year, the Secretary of State shall mail a notice in writing to each corporation against which a tax is assessed, notifying such corporation of the amount of the franchise tax assessed against it for the year next ensuing, commencing on July first, and the amount found by the Secretary of State to be due upon an increase of capital stock of a foreign corporation represented in this state, and that objections, if any, to such assessment will be heard by the officer making such assessments, upon request by corporation on a day not later than the twenty-fifth day of June, provided upon proper showing to the Secretary of State that the failure to request a hearing before that date was due to the absence or sickness on the part of some officer of the corporation, the Secretary of State may grant a hearing after that date. Such notice shall further state that the tax herein assessed is payable to the officer making the assessment on July first after the date of the notice. The notice required by this section shall be mailed to the cor-

poration addressed to its post-office address, as shown by the records in the office of the Secretary of State. A failure to receive the notice mentioned in this section shall not relieve a corporation of the obligation to pay the annual franchise taxes nor shall it invalidate the assessment of the tax.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 113. **Collection of Assessment.**—It shall be the duty of the officer making the assessment to collect the same.

Sec. 114. **Delinquent Corporations—Penalty.**—If the franchise tax assessed in accordance with the provisions of this act shall not be paid on or before the thirty-first day of July, it shall be deemed to be delinquent, and there shall be added a penalty of five per cent for each month or part of month that the same is delinquent, commencing with the month of August.

Sec. 115. **Franchise Taxes and Penalties a Prior Lien—Record of Taxes, Penalties and Costs.**—The franchise taxes assessed under this act, together with penalties, interest and costs that shall accrue thereon, shall be a prior and first lien on the real and personal property of the corporation from and including the first day of July of the year when such franchise taxes should have been paid until the same have been paid.

The Secretary of State shall make and keep in his office a record showing the name of each corporation against which a franchise tax has been assessed, the amount assessed against each corporation, together with penalties and costs, if any, and the date when paid, and a notation of any and all proceedings taken for the collection of the franchise tax.

Sec. 116. **Collection of Delinquent Franchise Taxes and Penalties—Procedure.**—In case any corporation shall fail, refuse or neglect to pay the franchise tax assessed against it on or before the thirty-first day of July, the Secretary of State shall issue a warrant, under his hand and official seal, directed to the Sheriff of any county in the state, commanding him to collect and return such franchise tax and penalties. It shall be the duty of the Sheriff receiving such warrant to levy upon and sell the personal property of such corporation to satisfy such franchise tax and penalties, together with the legal costs and charges of such Sheriff. Upon the receipt of such warrant the Sheriff shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments of courts of record, and shall be entitled to the same fees for the execution of the warrant, to be collected in the same manner. After proceeding in the manner prescribed, the Sheriff shall make the proper and necessary notations, of the amounts collected, upon the warrant and promptly return it to the Secretary of State within ninety days from the date of issuance thereof, with the amount of franchise tax and penalties collected by him, if any.

Sec. 128. **Payment of Franchise Tax and Fees as Condition to Doing Business or Maintaining Suits.**—No corporation required to pay a franchise tax or fee under the laws of this state shall transact any business in this state or maintain any action at law or suit in equity, unless such corporation shall have paid such franchise tax, or such fees and penalties when the same become due and payable until such franchise taxes, fees and penalties have been paid in full.

Sec. 129. **Annual Franchise Taxes.**—In addition to all other fees required by law to be paid, the Secretary of State shall collect in advance from corporations subject to a franchise tax, annual franchise taxes as follows:

(1) If a corporation is organized, or admitted to do business in this state, or its capital stock issued or increased;

(a) Between July first of any year (after the year 1919), and September thirtieth of the same year a franchise tax equal to the full amount of the annual franchise tax;

(b) Between October first of any year (after the year 1919) and December thirty-first of the same year a franchise tax equal to three-fourths of the annual franchise tax;

(c) Between January first of any year and the last day of February of the same year, a franchise tax equal to one-half of the annual franchise tax;

(d) Between March first of any year and June thirtieth of the same year, a franchise tax equal to one and one-third of the annual franchise tax.

The franchise tax required by paragraphs "a," "b" and "c" shall be for authority of the corporation to carry on its corporate business until the thirtieth day of June following the date of payment of such tax. The franchise tax required by paragraph "d" of existing corporations increasing their capital stock shall be for authority of the corporation to employ its increased capitalization in this state until the thirtieth day of the second June following, but such corporation shall still be liable to pay its annual franchise tax upon its old capital stock in July following in the same manner as required of other corporations not increasing their capital stock. The fees required in this section shall be based upon the percentum of issued capital stock as evidenced by latest annual re-

port required to be filed under the provisions of this act, if any.

The word "between," as used in this section, shall include both dates specified.

As amended by L. 1927, p. 354, approved and in force May 12, 1927.

Sec. 130. **In Addition to Other Licenses or Taxes.** —The annual franchise taxes imposed by this act shall be in addition to any specific licenses or taxes imposed by law upon such corporation for the privilege of carrying on its business, or upon its franchise or property.